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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re J.P., a Person Coming Under the Juvenile
Court Law.

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Plaintiff and Respondent,

v.

MIGUEL V.,

Defendant and Appellant.

F078542, F078814

(Super. Ct. No. 518206)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Stanislaus County. Ruben A.
Villalobos and Ann Q. Ameral, Judges.†

Suzanne M. Nicholson, under appointment by the Court of Appeal, for Defendant
and Appellant.

* Before Franson, Acting P.J., Smith, J. and DeSantos, J.

† Judge Villalobos presided at the Welfare and Institutions Code section 388
petition hearing; Judge Ameral presided at the Welfare and Institutions Code
section 366.26 hearing.

Thomas E. Boze, County Counsel, and Maria Elena R. Ratliff, Deputy County Counsel, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Miguel V. (father) contends the juvenile court erred in denying his Welfare and Institutions Code¹ section 388 petition without a hearing. He also contends that had he been afforded an evidentiary hearing, the juvenile court ultimately would not have terminated his parental rights and set a permanent plan of adoption for his minor son, J.P. (the minor). We affirm.

FACTUAL AND PROCEDURAL SUMMARY

Father is the only appellant in this appeal; therefore, we focus on the facts of the case pertaining to him.

On February 5, 2018, Stanislaus County Community Services Agency (agency) received a referral from a hospital that mother, Y.C. (mother), had given birth a few days earlier and indicated she wanted to relinquish the minor for adoption. When family members were around, however, mother acted as though she was intending to keep the minor. Mother had a history of using methamphetamine, cocaine, and other illegal substances. Neither mother nor father seemed “to have basic knowledge of infant care and neither appears able to follow the instructions for care as given by the nurses.”

The social worker spoke with a nurse at the hospital, who stated mother was not allowed to be in a room with the minor unsupervised due to her behavior and comments that concerned hospital staff. Mother had made comments about the minor not being attractive and not liking his features. Mother did not ask to hold or feed the minor and the minor remained in the nursery most of the time since birth.

¹ References to code sections are to the Welfare and Institutions Code.

Mother told the social worker that she never wanted children but got pregnant by father. Mother described her relationship with father as “so-so” and indicated they often argue and there had been incidents of domestic violence. Mother indicated she was diagnosed with depression but was not taking medication to treat the depression. Mother also acknowledged past drug use and refused to drug test voluntarily.

In father’s interview with the social worker, he stated he had been diagnosed with schizophrenia in 2013 and was currently taking medication because he “hears voices.” Father was in prison from 2013 through 2016 “due to immigration issues.” Father tested positive for THC and father admitted using marijuana. He also told the social worker the landlord would not allow anyone, including the social worker, to inspect the home.

When the social worker inspected the family home, she found there was no living room furniture. In the living room was a trash bag filled with beer cans. Knives were on a counter and pills were on the floor and counter top. There was no infant formula in the home, even though the minor had been bottle fed since birth. Father did not know what infant formula was and the social worker explained it to him.

The parents signed a protective custody waiver on February 6, 2018, after the mother stated she did not “want that ugly ass kid.”

On February 6, 2018, the social worker spoke with the maternal grandmother. Grandmother indicated she would be in Modesto for a while and then take the minor and mother to live with her in San Mateo County. Grandmother stated she would not allow mother to be unsupervised with the minor and would have a friend assist when grandmother was at work. Later in the morning, the social worker met with both parents and the grandmother at the hospital. The grandmother asked if there were funds available to pay for a babysitter.

The hospital social worker informed the agency social worker that the grandmother wanted to keep the minor in the family but not care for the minor. The grandmother would not change or feed the minor in the hospital. The mother’s doctor

was concerned with the mother's lack of bonding with the minor and mother's statements she did not want the minor. The doctor would not issue discharge orders for the minor until a plan was in place for his care.

The minor was detained on February 9, 2018. Grandmother was told that her not having a driver's license would be an issue because the minor would need to be driven to doctor's appointments, visitation, and potentially daycare.

The jurisdiction and disposition report recommended the minor be removed from the custody of his parents and that reunification services be provided to both parents. Father reported that he wanted to focus on his reunification services. Staff reported that during visits, both parents had to be continuously directed on how to properly handle the minor; the parents constantly passed the minor back and forth between them and touched his face. Staff recommended visits be changed from once weekly for two hours to twice weekly for one hour.

At the March 15, 2018 jurisdiction and disposition hearing, the minor was declared a dependent of the juvenile court and removed from the custody of his parents. A parent mentor was added to the proposed case plan and a three-month informal progress review hearing was scheduled.

An informal report for the review hearing noted that during parenting classes, father did not pay attention, spent his time criticizing mother, refused to follow directions, and would fall asleep. The parent mentor was assisting with visitation and reported mother continuously made negative comments about the minor and father did not intervene. Father needed to be reminded to hold the minor properly.

The agency filed a section 388 petition on June 12, 2018, seeking to have father's visitation be once per week and to have mother cooperate in a psychological evaluation.

Neither parent appeared for the combined hearing on the section 388 petition and the progress review. The section 388 petition was granted.

The six-month review report recommended termination of reunification services for both parents and the setting of a section 366.26 hearing to terminate parental rights and consider a plan of adoption. The minor was in a stable placement with his maternal grandmother. Father had appeared for visits with the minor while under the influence; had arrived 30 minutes late for visits; and had cancelled visits.

Father had not completed his individual counseling services, or his clinical assessment as called for in the case plan. The agency was unable to obtain information on the current status of father's participation in a mental health assessment and mental health services. Father's parent mentor reported that father listened to some instructions on how to interact with the minor. The mentor also reported that father requested assistance obtaining a job, housing, and other services, but failed to follow through on appointments the mentor scheduled on his behalf. Father did not complete parenting classes.

Father appeared to be under the influence at some visits but refused to drug test. Father had once per week visits but had missed some visits and was late to some visits.

Both parents were living with the paternal grandmother. Neither parent was employed. The parents relied on the agency for transportation.

The agency concluded that father's efforts towards reunification had been "minimal." It was recommended that reunification services be terminated for both parents, as "continuing services would only delay permanency" and stability for the minor and there was no expectation that the minor would be returned to their care with further services because of "their lack of effort."

The scheduled September 7, 2018 review hearing was continued and eventually set for a contested hearing on October 3, 2018.

An addendum report filed prior to the contested hearing reported that father informed the agency on August 20, 2018, that neither he nor mother were going to continue to participate in services because they wanted to move forward with a plan of

adoption for the minor. The addendum report noted that when grandmother brought the minor for a visit, he was not properly secured in a car seat.

At the October 3, 2018 contested hearing, counsel for father stated that he had discussed the matter with father; father understood the recommendation was to terminate reunification services with likely termination of parental rights at a section 366.26 hearing; and father was “submitting to the recommendation.”

The agency raised concerns about unauthorized contact between mother, grandmother, and the minor. The agency warned that if grandmother allowed unauthorized contact between either parent and the minor it “jeopardizes placement.”

The juvenile court found that mother’s progress was none and father’s was limited. Because of the “lack of progress and the lack of willingness even to participate” in services, the juvenile court terminated reunification services.

The juvenile court admonished the grandmother that it appeared she was allowing unauthorized access to the minor and that if she violated the court’s order in this regard, “then [the minor] very well will be removed from you.” The grandmother indicated she understood.

On October 19, 2018, father filed a section 388 petition indicating that the minor had been removed from the grandmother’s custody because she drove to the court with the minor and did not have a driver’s license. Father maintained he had not contested the recommendation to terminate reunification services because the minor was placed with the grandmother. Father asked that the minor be returned to the grandmother’s custody or that reunification services be reinstated.

A hearing was held on November 14, 2018, to determine whether an evidentiary hearing should be scheduled for father’s section 388 petition. The juvenile court denied

the request for an evidentiary hearing. Father filed a timely notice of appeal of the denial of the section 388 petition on December 17, 2018.²

The section 366.26 report recommended that parental rights be terminated, and a permanent plan of adoption be established for the minor. At the January 31, 2019 section 366.26 hearing, father was present with counsel. The agency reported that father visited with the minor on January 28, 2019, his first visit during the reporting period. Counsel for father renewed the request to grant the section 388 petition and place the minor back with the maternal grandmother. If this request was denied, father objected to the termination of parental rights and plan of adoption.

The juvenile court denied the renewed section 388 request, found the minor to be adoptable, and terminated parental rights. Father filed a timely notice of appeal from the section 366.26 order terminating parental rights on February 14, 2019.³

By order filed March 19, 2019, this court consolidated the two appeals.

DISCUSSION

Father contends the juvenile court erred in denying his section 388 petition without an evidentiary hearing, and that this error requires reversal of the section 366.26 order terminating his parental rights.

Standard of Review

We review the juvenile court's denial of father's section 388 petition without an evidentiary hearing for abuse of discretion. (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079.) The denial must be upheld unless we can determine from the record that the juvenile court's decision exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, we have no authority to substitute our decision for that of the juvenile court. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.)

² This appeal was designated as case No. F078542.

³ This appeal was designated as case No. F078814.

Analysis

A petition to modify a juvenile court order under section 388 must allege facts showing new evidence or changed circumstances exist and that changing the order will serve the child's best interests. (§ 388, subd. (a)(1)–(2); *In re Nolan W.* (2009) 45 Cal.4th 1217, 1235.) Courts must liberally construe a section 388 petition in favor of its sufficiency. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 (*Marilyn H.*)). However, section 388 requires a petitioner to make a prima facie showing of both elements to trigger an evidentiary hearing. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) If, for instance, the parent makes a prima facie showing of changed circumstances, the juvenile court can still deny the petition without an evidentiary hearing if the parent fails to make a prima facie showing that the relief sought would promote the child's best interests. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188–190; see *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 322–323.)

“ ‘A “prima facie” showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.’ ” (*In re Josiah S.* (2002) 102 Cal.App.4th 403, 418.) Consequently, section 388 petitions with general, conclusory allegations do not suffice. Otherwise, the decision to grant a hearing on a section 388 petition would be nothing more than a pointless formality. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) “In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case.” (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 258.)

We conclude that the juvenile court did not abuse its discretion in denying father's section 388 petition without a hearing.

To support a section 388 petition, the change in circumstances must be substantial. (*In re Heraclio A.* (1996) 42 Cal.App.4th 569, 577.) Father wanted the minor returned to the maternal grandmother, or a resumption of reunification services. Father presented no

evidence that he had completed the individual counseling or parenting classes that were components of his case plan, and no evidence that he had learned how to properly interact with the minor. Thus, there was no evidence of a substantial change in circumstances that would have warranted resumption of reunification services.

There also was no evidence that granting the section 388 petition was in the best interests of the minor. The grandmother had been transporting the minor without having a driver's license and she allowed unauthorized contact between mother and the minor. Grandmother's conduct showed poor judgment and placed the minor at risk. The minor had been in foster care since birth and after being removed from grandmother's custody, was placed in a foster home where the foster parents wished to adopt the minor. While relatives, such as the maternal grandmother, are entitled to consideration for placement, any placement is still subject to an assessment for appropriateness. (§ 361.3; *Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 863.)

Parent and child share a fundamental interest in reuniting up to the point at which reunification efforts cease. (*In re R.H.* (2009) 170 Cal.App.4th 678, 697, overruled on other grounds in *John v. Superior Court* (2016) 63 Cal.4th 91, 99, fn. 2.) By the time of a section 366.26 hearing to select and implement a child's permanent plan, however, the interests of the parent and the child have diverged. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254.) Therefore, after reunification efforts have terminated, the court's focus shifts from family reunification toward promoting the child's needs for permanency and stability. (*Marilyn H., supra*, 5 Cal.4th at p. 309.) In fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. (*Id.* at p. 310.) "A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

Our role as a reviewing court is to assess whether the court below committed error based on the record before it, and we do not reweigh evidence or rely on evidence that

was not in the court's record at the time it made its order. "[A]n appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration. (See *People v. Pearson* (1969) 70 Cal.2d 218, 221, fn. 1; *People v. Preslie* (1977) 70 Cal.App.3d 486, 490; [citation].)" (*In re James V.* (1979) 90 Cal.App.3d 300, 304.) Based on the record before the juvenile court at the time the court ruled on father's section 388 petition, we find the juvenile court did not abuse its discretion in denying the section 388 petition without an evidentiary hearing because father failed to make a prima facie showing either of changed circumstances or best interests of the minor.

Because we conclude father's contention the juvenile court erred in denying his section 388 petition without an evidentiary hearing is without merit, we also conclude the juvenile court did not err in denying his oral renewal of the motion at the section 366.26 hearing. Father presented no additional evidence to support the petition, either of changed circumstances or best interests of the minor.

Furthermore, by the time of the section 366.26 hearing, the minor had been placed in the prospective adoptive home for a period of time that was equivalent to the amount of time the minor had spent in grandmother's custody. The agency reported that the minor had developed a loving bond with his foster parents and foster sibling and the foster parents provided the minor with a "loving and nurturing environment." The foster parents had been caring for the minor when he reached developmental milestones, such as crawling and pulling himself up in preparation for walking. The foster parents were "excited about the opportunity to provide [the minor] with a safe and permanent home." Additionally, the agency was not confident the maternal grandmother "would protect and keep [the minor] safe from his parents who have very limited and poor parenting skills."

The evidence established that the minor had adjusted well in his current foster home; the foster parents wished to adopt the minor; and adoption by the foster parents would provide permanency and stability the minor had lacked since birth.

The juvenile court did not abuse its discretion in denying the oral renewal of the section 388 motion at the section 366.26 hearing. The minor has been in the dependency system his entire life and needs permanency and stability, which neither his parents nor his relatives were able to provide.

DISPOSITION

The juvenile court's orders denying father's section 388 petition, terminating the parental rights of mother and father, and establishing a permanent plan of adoption for the minor are affirmed.